



## Osgoode Hall Law Journal

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*Volume 22, Number 2 (Summer 1984)*

Article 8

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### Citation Information

Wright, Barry. "Towards a New Canadian Legal History." *Osgoode Hall Law Journal* 22.2 (1984) : 349-374.  
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# Towards a New Canadian Legal History

## **Abstract**

This article examines the process by which traditional Canadian legal history is becoming more interdisciplinary. When the external and environmental aspects of a historical period are explored, as well as the legal developments, the legal historian's work is more relevant and truly historical. Recent essays are measured against Wright's model of progressive legal history.

# TOWARDS A NEW CANADIAN LEGAL HISTORY

BY BARRY WRIGHT\*

*This article examines the process by which traditional Canadian legal history is becoming more interdisciplinary. When the external and environmental aspects of a historical period are explored, as well as the legal developments, the legal historian's work is more relevant and truly historical. Recent essays are measured against Wright's model of progressive legal history.*

## I. INTRODUCTION

Two recent collections of essays suggest that the study of Canadian legal history is at a crossroads.<sup>1</sup> The essays range from "traditional" descriptive or doctrinal work to ambitiously interdisciplinary "modern" work. The latter group indicates that Canadian legal history is in transition and on the verge of important new development. It is an appropriate time to explore this transition and place it in context.

History and law have had an uneasy relationship. As Milsom observes: "Few lawyers venture into history and few historians deal with the law on its own terms."<sup>2</sup> Lawyers, versed in common law precedent, tend to relegate history to the ahistorical function of providing authority on present-day problems. Historians tend to be daunted by the arcane technicalities of the law. Consequently, legal history has been a marginal activity and approaches to the subject have often been inadequate. However, as awareness of the social sciences develops in legal scholarship, there is an increasing rejection of traditional complacencies. New questions are being asked about our understanding of the legal system, and legal history is being looked at to provide some of the answers.

There are encouraging signs. The recent increased output of legal history has generated both explicit reflection and intense debate by le-

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<sup>1</sup> Flaherty, ed., *Essays in the History of Canadian Law* (1983) [hereinafter the Osgoode Society collection]; (1983), 21 Osgoode Hall L.J. 159-362 [hereinafter the Law Journal collection].

<sup>2</sup> "Introduction," in Pollock and Maitland, eds., 1 *The History of English Law* (2nd ed., 1980) at xxvi.

gal historians on the nature of their enterprise. At the most fundamental level, it is recognized that legal history must transcend apologism and have a truly historical focus on change. Beyond this, developing concerns may be distilled into two general issues.

First, concern is directed to the scope of legal history. A progressive approach is interdisciplinary. It is expected to benefit from and contribute to other contemporary approaches in the social sciences. This requires the breaking away from the tenacious orthodoxy in law which dictates that legal phenomena must be explained as much as possible in terms of other distinctively legal phenomena. Progressive legal history rejects the notion that the law exists and evolves autonomously from social, political and economic forces. It attempts to explore the systematic ways in which the legal system is related to these "external phenomena."

Second, there is growing concern about the related problem of methodology. Most of the legal historians who have widened their scope of inquiry are adamant in rejecting traditional description based on a narrow range of sources. Although the move beyond description to explanation involves serious difficulties, progressive legal historians attempt to be sensitive to the problems of theory, interpretation and analytical rigour.

Traditional approaches, presupposing an autonomous, closed and timeless legal system, cannot satisfy the demand for wider scope, methodological rigour and truly historical focus on change. Progressive approaches and new legal history are used here as general terms to denote work that is sensitive to these demands.<sup>3</sup>

Explicit reflection about these issues, and their implications for the study of Canadian legal history, is appropriate for, as the Osgoode Society and the Osgoode Hall Law Journal collections suggest, the discipline is poised on the brink of a flurry of progressive work. After a brief review of the collections, this essay is divided into three sections. First, what is the context for the transition taking place in legal history? This section examines the development of progressive approaches to legal scholarship in general and the challenge they present for legal history. Second, what are the issues facing the new legal history? This section explores the specific concerns of progressive approaches, examines some general considerations and briefly illustrates some existing examples. Finally, what are the particular Canadian issues in legal history? Sen-

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<sup>3</sup> Descriptive labels such as "progressive", "new", "social scientific" etc. are easily abused. Progressive and new are used throughout this essay with an awareness of the dangers both of monopolizing their use and of patching over important conflicts within an evolving discipline.

sitivity to these particularities is not merely a matter of “added-on” obligatory Canadian content. Some avenues for research are suggested, and one is briefly developed to underline the potential for further work.

## II. REVIEW OF THE ESSAYS

Canadian legal history was once a marginal part-time interest for rather uncritical scholars. It was half-heartedly enlisted in the attempt to legitimate existing legal institutions by appealing to tradition. Riddell may be regarded as the father of English Canadian legal history and his work is typical of this approach. As Wylie remarks:

Historians of Upper Canada have tended to portray the law as a closed system. According to William Renwick Riddell, the courts developed in response to the input of judges, lawyers, and politicians, all apparently acting without social interests.<sup>4</sup>

Matters have radically changed in the last few years. Morel's introductory essay to the Osgoode Hall Law Journal collection suggests that an identifiable and diverse legal historical community is finally emerging in the country.<sup>5</sup> Many of the essays in both collections represent a clear departure from the descriptive tradition in legal history. These developments are producing new insights that widen the boundaries of the discipline.

Several essays deal with the courts. Normally a dry subject, two essays in the Osgoode Society collection illustrate the potential of imaginative approaches. Wylie's essay studies the inter-elite tensions between the rising commercial class and the anglophile Family Compact regarding the structure and operation of the Upper Canadian civil courts during their formative period.<sup>6</sup> Craven's essay on the Toronto Police Court from 1850 to 1880 stresses the important social stabilizing function of the “theatre” of that court.<sup>7</sup> Brown's essay on the Court of Chancery in Upper Canada introduces an area that has great potential for further work, particularly with regard to the province's economic development.<sup>8</sup> Bank's work on the evolution of the Ontario courts to the present day is somewhat descriptive, but is nonetheless a useful guide

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<sup>4</sup> *Instruments of Commerce and Authority: The Civil Courts in Upper Canada 1790 - 1819*, the Osgoode Society collection, *supra* note 1, at 3.

<sup>5</sup> *Canadian Legal History - Retrospect and Prospect*, the Law Journal collection, *supra* note 1, at 159.

<sup>6</sup> *Supra* note 4.

<sup>7</sup> *Law and Ideology: The Toronto Police Court 1850 - 1880*, the Osgoode Society collection, *supra* note 1, at 248.

<sup>8</sup> *Equitable Jurisdiction and the Court of Chancery in Upper Canada*, the Law Journal collection, *supra* note 1, at 275.

to what was often very confusing development.<sup>9</sup>

Risk examines the "nuisance of litigation" in his study of the origins of Ontario workers' compensation.<sup>10</sup> Bendickson deals with social and economic regulation in his essay on private rights and public purposes in Ontario's waterways.<sup>11</sup> It is hoped that this line of work will be taken further. The resort to administration rather than the courts is an important and neglected aspect of Canadian legal history, particularly with regard to economic development.

Several essays are concerned with the criminal law. This field has been the subject of a proliferation of interesting work since the 1970s, especially by criminologists and social historians in Britain.<sup>12</sup> The history of criminal law is a fertile source of research because it often clearly illustrates the conflict of social values. Backhouse's study of Canadian rape law in the nineteenth century, pointing out its similarities and contrasts with English legislation, shows how perceptions of women have changed from notions of property to sexist paternalism.<sup>13</sup> Melling's essay on mid-nineteenth century English habitual offenders legislation develops the theme of a "suddenly closed society," examining how public and state concerns about the maintenance of social stability led to experimentation with legal mechanisms.<sup>14</sup> An essay by Knafla and Chapman comparing early criminal justice in Lower Canada is general and descriptive.<sup>15</sup> Comparisons of the reception of English law into various Canadian jurisdictions is an area that requires further research.

Hay's essay on the evolution of the English public prosecutor provides a new look at legal institutions that lawyers often take for granted.<sup>16</sup> Throughout the eighteenth century and a good part of the

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<sup>9</sup> *The Evolution of the Ontario Courts 1788 - 1981*, the Osgoode Society collection, *supra* note 1, at 492.

<sup>10</sup> *The Nuisance of Litigation: The Origins of Workers' Compensation in Ontario*, the Osgoode Society collection, *supra* note 1, at 418.

<sup>11</sup> *Private Rights and Public Purposes in the Lakes, Rivers and Streams of Ontario 1870 - 1930*, the Osgoode Society collection, *supra* note 1, at 365.

<sup>12</sup> See, e.g., Hay et al., eds., *Albion's Fatal Tree: Crime Society in Eighteenth Century England* (1975) and Jones, ed., *Crime Protest, Community and the Police in the Nineteenth Century* (1982).

<sup>13</sup> *Nineteenth-Century Canadian Rape Law 1800 - 1892*, the Osgoode Society collection, *supra* note 1, at 200. Blackhouse admits that the transformation from notions of property to sexist paternalism, especially in areas such as marriage, was far from clear.

<sup>14</sup> *Cleaning House in a Suddenly Closed Society: The Genesis, Brief Life and Untimely Death of the Habitual Criminals Act, 1869*, the Law Journal collection, *supra* note 1, at 315.

<sup>15</sup> *Criminal Justice in Canada: A Comparative Study of the Maritimes and Lower Canada 1760 - 1812*, the Law Journal collection, *supra* note 1, at 245.

<sup>16</sup> *Controlling the English Prosecutor*, the Law Journal collection, *supra* note 1, at 165.

nineteenth century, the power of the ordinary citizen to put the criminal law into action was regarded as a constitutional guarantee of civil liberty. Hay points out that the growth of public prosecutorial power through the near exclusive direction of the Attorneys-General has eroded this liberty.<sup>17</sup> One wishes Hay had extended his discussion of the Canadian situation further. The potential for prosecutorial partiality goes beyond that of England: in most Canadian jurisdictions the Attorney-General is included in the Cabinet.

Hay's essay illustrates the importance of approaching the legal system in unconventional ways. Several others follow this route. Parker's essay on the regulation of sexual activity is a novel examination of how the operation of law reflects social values about taboo subjects.<sup>18</sup> Baker's study of legal education from the founding of Upper Canada to the late nineteenth century opens up a fascinating area of study. Legal education is a significant socializing force and, as Baker demonstrates, this significance was realized at an early point by the Law Society of Upper Canada.<sup>19</sup> Romney and Foster discuss illuminating isolated events or phenomena. Romney looks at Toronto's £10,000 job scandal to explore the operation of the law and conceptions of the public interest.<sup>20</sup> Foster studies the Kamloops outlaws to illustrate the functions of the Commissions of Assize in nineteenth century British Columbia.<sup>21</sup>

The essays deal predominantly with the law and social values, economics and state power. Although a few of the essays unfortunately are in a traditional descriptive vein, most throw new light on assumptions, or open up new areas of study while combining imaginative approaches with challenging subject matter. These essays attempt to relate law to "external phenomena." Canadian legal history, like legal history in other jurisdictions, is escaping its marginality. It is an opportune time to be reflective about the discipline.

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<sup>17</sup> Hay's essay accomplishes an important task. It illustrates that historical work can be relevant to present day political concerns; the essay is reminiscent of E.P. Thompson's implicit plea for the protection of civil liberties in *Whigs and Hunters* (1975). Throughout his discussion of the "rule of law," Thompson indirectly attacks the current erosion of traditional civil liberties through the growth of police powers in Britain. See also Anderson, *Arguments Within English Marxism* (1980).

<sup>18</sup> *The Legal Regulation of Sexual Activity*, the Law Journal collection, *supra* note 1, at 187.

<sup>19</sup> *Legal Education in Upper Canada 1785 - 1889: The Law Society as Educator*, the Osgoode Society collection, *supra* note 1, at 49.

<sup>20</sup> *The Ten Thousand Pound Job: Political Corruption, Equitable Jurisdiction and the Public Interest in Upper Canada 1852 - 6*, the Osgoode Society collection, *supra* note 1, at 143.

<sup>21</sup> *The Kamloops Outlaws and the Commissions of Assize in Nineteenth-Century British Columbia*, the Osgoode Society collection, *supra* note 1, at 308.

### III. THE CONTEXT FOR THE TRANSITION IN LEGAL HISTORY

What are the origins of this transition in legal history? One must look to conditions created by developments in general legal scholarship. Legal history has experienced a belated response to a widening critical and social scientific orientation within legal studies as a whole. This movement in legal scholarship is an important context for the developing new legal history.

The rejection of traditional emphasis on doctrine and institutional description is not mere nihilistic criticism. The attack on typical legal preoccupations has had a long intellectual history. Bentham urged the demystification of the common law. He denounced Blackstone's edification of the process. He saw the judiciary as obfuscating, inefficient and contriving to serve vested interests.<sup>22</sup> Holmes was also skeptical. He firmly rejected Langdell's celebration of the common law and forwarded the "bad man" theory which emphasized the opportunism of participants within the legal process. Since the courts had little to do with morality, Holmes saw it as much more important to focus on what the courts do in fact, rather than on doctrine.<sup>23</sup> This concern was broadened in the 1920s and 1930s by the American "legal realists." Scholars such as Llewellyn and Frank stressed that doctrinal emphasis on rules was misplaced because judges often decide according to their own motivations and apply the appropriate legal rules as mere rationalization. Through empirical analysis the realists sought to study the law "in action" and to "clear away the dogmas of legal theology that obstructed law reform."<sup>24</sup> In Britain and elsewhere, German emigré legal scholars such as Kahn-Freund and Freidmann introduced European social scientific perspectives to the study of law.<sup>25</sup> More recently, the "law in context" movement has promoted concerted interdisciplinary work.

The most methodical examination of the issues involved in a critical, social scientific approach to the law has recently emerged with the

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<sup>22</sup> See Hart's superb essay, "The Demystification of the Law," in Hart, ed., *Essays on Bentham* (1982) at 21.

<sup>23</sup> *The Path of the Law* (1897), 10 Harv. L. Rev. 457.

<sup>24</sup> Livingstone, *Round and Round the Bramble Bush: From Legal Realism to Critical Legal Studies* (1982), 95 Harv. L. Rev. 1669 at 1675.

<sup>25</sup> "Kahn-Freund insisted in a famous lecture that a lawyer could not understand, let alone be an educated lawyer, unless he learned the law in the frame of a *universitas literarum* or *scientiarum*, that is, in conjunction with the other disciplines. . . ." Wedderburn, "Otto Kahn-Freund and British Labour Law," in Wedderburn, Lewis and Clark, eds., *Labour Law and Industrial Relations: Building on Kahn-Freund* (1983) at 29-30.



Critical Legal Studies Movement. Its development is very much the result of frustration amongst sensitive and perceptive legal academics with the artificial objectivity, elitist isolation and lack of concern for contemporary intellectual issues in the law school environment:

Outside the law school the main currents of twentieth-century intellectual life, encompassing Max Weber's work, phenomenology, structuralism and much more, have been driven by efforts to confront and resolve the question of how an assertedly objective intellectual enterprise could be founded on what analysis showed was an unavoidably subjective basis. For those who teach lawyers, however, the question is irrelevant. The conflict between objectivity and subjectivity is alien to their enterprise because no one believes that advocates are, or should be, objective. Thus in their role as teachers of lawyers, legal scholars are not confronted by the most stimulating problems of twentieth-century intellectual life. . . .<sup>26</sup>

Those involved with the Critical Legal Studies Movement seek to generate the appreciation of modern intellectual concerns on such questions as methodology within legal scholarship. Many of the Critical scholars see their task as the continuation of the abandoned realist project.<sup>27</sup> Others see their agenda as going beyond narrow reformism to a full scale sociology of the law, stressing "the open-ended character of the social and political context in which the substantive law is shaped."<sup>28</sup>

What implications do these unorthodox perspectives have for legal history? As legal studies become increasingly concerned with the context in which the law operated, the perspectives of the social sciences are invariably introduced more extensively into the analysis of legal phenomena. History is crucially important to such a broad approach to the law. It is the foundation of social scientific inquiry. As C. Wright Mills has observed: "History is and must be the very shank of the social sciences."<sup>29</sup> Social phenomena such as law require the perspective of historical development.

#### IV. THE INADEQUATE TRANSLATION OF PROGRESSIVE LEGAL THEORY INTO LEGAL HISTORY

Unfortunately, the recognition of the importance of history has been very slow in coming. Concern by progressive legal scholars with

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<sup>26</sup> Tushnet, *Legal Scholarship: Its Causes and Cures* (1981), 90 Yale L. J. 1205 at 1206.

<sup>27</sup> Livingstone, *supra* note 24, at 1669.

<sup>28</sup> *Id.* at 1677. For a sophisticated statement of the position, see Unger, *The Critical Legal Studies Movement* (1983), 96 Harv. L. Rev. 563. For a comprehensive discussion of the Movement, see *Critical Legal Studies Symposium* (1984), 36 Stanford L. Rev. 1.

<sup>29</sup> Quoted in Sugarman, "Theory and Practice in Law and History," in Fryer *et al.*, eds., *Law, State and Society* (1981) at 70.

moving beyond doctrinalism has only hesitatingly been translated into concern for progressive legal history, despite the importance of history to such a critical inquiry.

Almost a century ago Maitland realized that:

[A] lawyer is conservative in judgment and looks to the past only to find precedents for a case of evidence to sustain a pre-conceived opinion. Training in the law does not result in historical mindedness.<sup>30</sup>

Little appears to have changed until the mid-1970s. In 1973, Horwitz noted that the dominant legal history forwarded:

[a] profoundly conservative interpretation of the role of law in society. Its basic categories contain fundamentally conservative political preferences dressed up in the neutral garb of expert and objective legal history . . . [T]he main thrust of lawyer's legal history then, is to pervert the real function of history by reducing it to the pathetic role of justifying the world as it is.<sup>31</sup>

Commenting on the Canadian scene ten years ago, Parker observed: "A cynic, surveying the bleak state of writing and teaching of the history of Canadian law might simply implore the law schools to do something."<sup>32</sup>

In Britain, legal history has only recently overcome a distinct medieval orientation as characterized by the activities of the Seldon Society. The great figure in English legal history is undoubtedly Maitland, described as "a man with a genius for history, who turned its light upon law because law, being his profession, came naturally into the field."<sup>33</sup> There has not been much progress beyond Maitland's landmark work.<sup>34</sup> Maitland himself escaped the tyranny of doctrinalism, but he died at a young age and his students ossified his contributions. Holdsworth was the most influential and destructive of the next generation. As Parker states:

Holdsworth's most elaborate statement in legal history leaves me with the impression that he did not learn the lessons of Maitland's legal historiography. I doubt whether he ever understood the meaning of critical history. Holdsworth possessed great skill as a narrative historian but his rigid philosophy of law warped his vision. He shared with Blackstone a firm belief that English law was perfect.<sup>35</sup>

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<sup>30</sup> Cameron, *Frederick William Maitland and the History of English Law* (1961) at 3. See also, Maitland, "Why the History of English Law is Not Written," (1884), *Collected Papers I* (1911, reprinted 1975) at 480.

<sup>31</sup> *The Conservative Tradition in the Writing of American Legal History* (1973), 7 Am. J. Leg. Hist. 275 at 276.

<sup>32</sup> *The Masochism of the Legal Historian* (1974), 24 U.Toronto L. J. 279 at 317.

<sup>33</sup> Maitland as described by Sir Frederick Pollock, quoted in Cameron, *supra* note 30, at 3.

<sup>34</sup> *Supra* note 2.

<sup>35</sup> *Supra* note 32, at 295.

The damage caused to the discipline was extensive and little was done to build upon Maitland's work in a progressive direction. Recently, Milsom's work has caused a big stir.<sup>36</sup> His antiquarian subject matter is explained in terms of a process of chance expedient manoeuvrings rather than the traditional view of a process of human achievement. This is remarkable perhaps for traditional legal history, but not for history, which largely left human achievement notions behind in the nineteenth century. Fortunately, the influence of outsiders such as E.P. Thompson and insiders such as David Sugarman promises to transform legal history in England into a fully progressive orientation.

American legal history has been more diversified. Many of the prominent legal historians were preoccupied with English medieval legal history. In addition, a "constitutionalist" interpretation developed which focused on how the American constitution made American law unique. Nonetheless, these scholars were marginal and Borstin heavily criticized the continuing ornamental role of legal history in the law schools in the late forties.<sup>37</sup> A liberal tendency emerged in American legal history in the fifties. The scholars in this movement stressed that the legal system helped to promote economic growth.<sup>38</sup> Willard Hurst elaborated this interpretation to the greatest extent, attempting to integrate it with American functionalist sociology.<sup>39</sup> Although Hurst managed to get away from the primacy of doctrine, a thorough-going progressive tradition was not established. As little as fifteen years ago scholars such as Woodard and Horwitz were able to effectively criticize the continuing marginality of legal history and the inadequate historical exploration of the legal system's relationship to its external environment.<sup>40</sup> Matters have recently changed rapidly with the work of Horwitz, Genovese and others.

The writing of Canadian legal history may be divided into three historical phases. The first period lasted until the early 1970s. The sub-

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<sup>36</sup> Milsom, *Historical Foundations of the Common Law* (2nd ed., 1981).

<sup>37</sup> Borstin, *The Humane Study of Law* (1948), 51 Yale L. J. 960.

<sup>38</sup> See Holt, *Norton Horwitz and the Transformation of American Legal History* (1982), 23 Wm. and Mary L. Rev. 663 at 686-91, for a discussion of these legal historical traditions.

<sup>39</sup> Hurst states, in his study of the law and the Wisconsin timber industry, that "[t]he basic function of law, as of any form of social intelligence, is to increase men's ability to achieve rational control over social change in order to liberate their natural capacity for growth." As quoted in Gordon, *J. Willard Hurst and the Common Law Tradition in American Legal Historiography* (1975), 10 Law and Soc. Rev. 9 at 46. These assertions are very similar to those found in the work of Talcott Parsons.

<sup>40</sup> See Woodard, *History, Legal History and Legal Education* (1967), 53 Virginia L. Rev. 89. Horwitz, *supra* note 31.

ject then had an essentially English orientation and it was regarded as purely peripheral to the main concerns of the law departments. Riddell and Lareau may be considered the "fathers" of indigenous Canadian legal history. Riddell wrote prolifically on matters concerning the Ontario Courts in a thoroughly unremarkable and descriptive fashion.<sup>41</sup> Lareau's *Histoire du Droit Canadien* is a massive work spanning the beginning of the seventeenth to the end of the nineteenth century. Unlike Riddell, he addressed legislative history and the important reception question.<sup>42</sup> Riddell and Lareau created very isolated contributions which were not developed.

The 1970s may be characterized as the second phase consisting of frustration, emerging self-consciousness and developing positive achievements. Parker surveyed the bleak state of teaching and writing in Canadian legal history and criticized the lack of real history in the discipline.<sup>43</sup> Risk examined different aspects of Ontario law and economy.<sup>44</sup> Hay's work on criminal assizes had enormous impact.<sup>45</sup> Hyde has termed it "one of the most sophisticated sociological accounts of legitimation of which I am aware."<sup>46</sup> Canadian legal history is now entering a new phase in which scholars are confidently overcoming the obstacles to the discipline. The two recent collections of essays underline this transition where progressive approaches are being developed as a matter of course.

There have been considerable changes in the last ten years. However, questions remain unanswered. Why has legal history been stubbornly marginal and parochial for so long? Why has there been such a slow translation of progressive concerns into the field? The explanation may be found in the particularly acute manner in which legal historians face the obstacles to progressive legal scholarship. Legal history is confronted with difficulties created by the demands of professional training in the law departments and, more fundamentally, by the pervasive influence of an inherently ahistorical common law tradition.

Legal historians have not been sufficiently supported in the law schools. Professional training is invariably emphasized at the expense of

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<sup>41</sup> Riddell, *The Courts of the Province of Upper Canada or Ontario* (1928).

<sup>42</sup> Lareau, *Histoire du droit canadien depuis l'origines de la colonie jusqu'à nos jours* (2 vols., 1888, 1889).

<sup>43</sup> Parker, *supra* note 32.

<sup>44</sup> Risk, *The Law and Economy in Mid Nineteenth-Century Ontario* (1977), 27 U.Toronto L. J. 403.

<sup>45</sup> Hay, "Property, Authority and the Criminal Law" in Hay *et al.*, eds., *supra* note 12, at 17.

<sup>46</sup> Hyde, *Legitimation in the Sociology of Law* (1983), Wisconsin L. Rev. 379.

social scientific research.<sup>47</sup> A professional orientation combined with the time consuming case method leaves little opportunity for consideration of legal history:

The role of academic lawyers is essentially that of helots to practitioners and (to borrow Thomas Bergin's term) Hessian trainers — that is to say, drill instructors for a rather smart kind of mercenary. . . . There is a long and well established tradition of resistance by academics to the more pedestrian demands of practice minded clients (students). But since the primary economic base of law teaching is preparation for practice, this resistance has rarely been overt or whole-hearted.<sup>48</sup>

Many legal scholars are daunted by the prospects of historical research. The intellectual demands are unusual and wide ranging. Although legalistic explanation may be perceived as inadequate, it is always tempting to fall back on traditional analysis. Exploration of the legal systems' external phenomena "is a frightening experience in the Canadian and English context and hits home at the way many Anglo-Canadian legal historians feel. They may not be idolators of the common law tradition but that is all they understand."<sup>49</sup> Is the law related to social, economic and political forces in any discernable, systematic way? Is it a forum for reconciling competing interests or is it an instrument of elite interest groups? These are formidable questions.

A more fundamental explanation is the influence of the inherently ahistorical common law tradition. This may appear to be a contradiction in terms, for is not the common law shaped by historical precedent? However, closer examination indicates that the common law tradition causes most lawyers to visualize the law as neutral and cautiously evolutionary. Legal development is portrayed as impersonally directed by the processes of the legal system. Law is perfected by adjudication in a rational and objective manner. It seems to have an autonomous life of universal norms.<sup>50</sup>

Such an outlook is inherently insular because it attempts to explain legal phenomena as much as possible in terms of other legal phe-

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<sup>47</sup> See Consultative Group on Research and Education in Law, *Law and Learning - Le droit et le savoir* (1983). The report examines the tensions between professional training and academic work. It expresses concern at the lack of support for research.

<sup>48</sup> Twining, *Law and Social Science: The Method of Detail* (1974).

<sup>49</sup> Parker, *Book Review of Manchester, A Modern History of England and Wales 1750 - 1950* (1982), 2 Now and Then 116.

<sup>50</sup> See, e.g., Pollock, *The Genius of the Common Law* (1967); Holdworth, *Some Lessons for Our Legal History* (1931). Blackstone states in III Bl. Comm. at 379:

It is wisely therefore ordered that the principles and axioms of law, which are general propositions, flowing from abstracted reason, and not accommodated to times or men, should be deposited in the hands of judges, to be occasionally applied to such facts as come properly ascertained before them.

nomena, autonomous from external forces. This appears to be what Maitland meant when he asserted that the history of law was not written because it was isolated from every other study.<sup>51</sup> The legal method, dominated by the common law, tends to use past principles to justify the present day activities. This process allows legal ideas, procedures and decisions to be used for present day authority, regardless of their particular historical context. History, on the other hand, is the very antithesis of this legalistic concern for continuity. It is preoccupied with change, contradiction and explanation. It does not *use* the past. It *studies* it. One might say that the processes of the common law attempt to be "supra-historical." This leaves traditional legal history conceptually alienated from history.

History challenges the integrity of the process of the common law at a very fundamental level. Not surprisingly, historicism is regarded by some lawyers as an attack on the very basis of the legal system. Posner, for instance, regards this sort of work as subversive and suggests that such groups as the Critical Legal Scholars should not be teaching law: "The anti-law people do not speak or comport themselves like lawyers. They are, in short, unassimilable and irritating foreign substances in the body of the law school."<sup>52</sup> Robert Gordon devotes a whole essay to describe the strategies employed by some legal scholars to avoid direct confrontation with history and its potentially destabilizing effects.<sup>53</sup> Historicist criticism gives rise to typical defences. The traditional response is denial; it is the assertion that legal reasoning's exclusive concern should be to work out the relationship of legal texts to a system of ahistorical norms.<sup>54</sup> "Cartesianism" is another response. It constructs drastically simplified models of social reality for use in legal analysis. The inadequacy of traditional doctrinal approaches is recognized, but reformulations invariably bolster the *status quo* because true historicism remains too inherently destabilizing.<sup>55</sup>

The problem must be confronted directly. History must be taken seriously and it must be allowed to play a central role in research. The avoidance of arid and irrelevant general legal approaches depends on legal history. Of course one must recognize the limitations many traditional legal historians have self-consciously set for themselves in proceeding with their tasks. Criticism is not levelled at the integrity of

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<sup>51</sup> *Supra* note 30.

<sup>52</sup> Posner, *The Present Situation in Legal Scholarship* (1981), 90 Yale L.J. 1111 at 1128.

<sup>53</sup> Gordon, *Historicism in Legal Scholarship* (1981), 90 Yale L. J. 1017.

<sup>54</sup> *Id.* at 1025.

<sup>55</sup> *Id.* at 1026-27.

traditional legal history. Rather, its artificially circumscribed scope and its implicit assumptions prevent it from being history. What appears to be internally consistent very quickly falls apart when put in the context of true historical contingency.

## V. THE CONCERNS OF PROGRESSIVE LEGAL HISTORY

The obstacles to progressive legal history must be directly confronted and overcome. Although this may bring into question the conventional ways in which the legal system is studied, it must be addressed if legal history is to decisively escape its marginality and make its full contribution to progressive legal scholarship. The concerns of progressive legal history will now be clarified and made concrete. First, history must be taken seriously by legal historians. Second, new legal history requires interdisciplinary scope. Finally, it must be concerned with methodology.

In order to be truly historical, legal history must focus on the centrality of change. This may seem an obvious point. However, as discussed earlier, the ahistoricism of traditional legal methods causes traditional legal history to be either irrelevant or a function of the common lawyer's use of the past. Progressive legal history persistently demystifies notions of continuity. It illustrates contradiction and studies the law in action. It does not assume the impartiality of the legal system.

Legal history must be concerned with scope. The Critical Legal Scholar's unease with intellectual awareness in legal scholarship is a response to the recognition that a comprehensive understanding of legal phenomena requires an interdisciplinary understanding. The new legal history is external in that it addresses the forces and phenomena that constitute the environment or context of the legal system. It breaks away from the tenacious legal ideology of the autonomy of the law. It also seeks to be comprehensive by attempting to explore the systematic ways in which the legal system is related to external forces and phenomena. In coming to terms with the law's relationship to its environment, progressive legal history contributes to and benefits from the other social sciences.

If the scope of legal history is widened is not the very identity of the discipline threatened? Traditionalists argue that widening the scope of legal history merely transforms it into general history, sociology or economics. If the focus of inquiry is the impact of historical, social, economic and political forces on legal development and the function of the legal system in relation to these forces, does legal history cease to be legal? What is the disciplinary relationship between legal history

and other areas of history? Certainly an interpretation which views law as to some degree contingent upon historical external phenomena will blur traditional categories. But if scholars are to be committed to the notion that the law must be explained in context, then the loss of clearly delineated and discrete categories must be accepted. This does not mean that legal history ceases to be legal. Few would deny that legal historians must start with the law and work outwards.

Legal history must also be concerned with method. Most legal historians who have widened their scope of inquiry are quite adamant in rejecting traditional description based on a narrow range of sources. However, is more ambitious work not overwhelmed by the sheer methodological immensity of the task? Should one confine oneself to the internal records of the system (such as cases, legislation and doctrinal treatises)? What other sources are to be consulted and how is one to determine their relative weight of influence? These questions involve the relationship between empirical research, theory and analysis.

Traditional descriptive legal history creates illusory objectivity by using a narrow range of sources. It is inevitably impressionistic. Subjectivity starts with the very selection of the materials it describes. It extends through the expression and summary of relevant points from the materials. It looms large with any attempts at interpretation. Barthes, Kuhn and others have explored the problem of the relationship between the interpreter and his materials.<sup>56</sup> Even the most consistent work is rife with assumptions. Although the move beyond description to explanation based on wider sources may increase the number of possible pitfalls, progressive legal history seeks to be sensitive to those problems. By recognizing these problems and reacting creatively, a progressive approach is explicit about methodology and strives for a marriage of theory and empirical research.

The existence of theory is inevitable. As Berger states, "Written history represents a self-conscious effort to establish the meaning of experience for the present and is subtly and unpredictably coloured by the milieu in which the historian lives."<sup>57</sup> Explicit theory is necessary. History involves explanation, not description. Collingwood once remarked, "In pseudo-history there is no conception of purpose, there are only relics of various kinds, differing among themselves in such ways that they can be arranged on a time scale."<sup>58</sup>

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<sup>56</sup> See, e.g., Sontag, ed., *A Barthes Reader* (1982) on interpretation, and Kuhn, *The Structures of Scientific Revolution* (2nd ed., 1970) on scientific pretension.

<sup>57</sup> *The Writing of Canadian History* (1977) at ix.

<sup>58</sup> *An Autobiography* (1982) at 104.



In addition to working out explicit theory, as wide a range of sources as possible should be examined. As Sugarman states:

One of the most important contributions of the American legal realists was to stress that any real understanding of the operation of the law in practice required that the focus of study shift from court decisions to the actual practices and norms of regulatory bodies, companies and individuals.<sup>59</sup>

Although the law is always the starting point, there cannot be a confinement to cases, legislation and treatises. One must keep working outwards to consider literature in other disciplines touching upon the area of study.

Theory is applied to wide ranging research through systematic analysis. Flaherty remarks:

Since legal history is first and foremost a branch of history, it is worth remembering that historians should not plunge into the task of explaining past behaviour without devising a scientific and ordered approach to their subject matter.<sup>60</sup>

The weighing of the relative influence of various sources requires the balance of theory and empirical research. The widest body of materials must be approached with the outlines of a theory. Indications of any assumptions must be exposed and examined, so that theory is addressed. The legal historian may then proceed in a systematic manner with meaningful and constructive empirical work: testing, modifying or rejecting hypotheses by means of rigorous analysis.

The major and distinct features of progressive legal history may now be identified. They are a combination of methodological rigour, comprehensive scope and historical focus on change. The analytical marriage of theory and empirical research, the addressing of the complex external forces and phenomena operating on and influenced by the legal system, and the critical demystification of notions of continuity are the positive challenges which must be dealt with.

Horwitz's *Transformation of American Law*<sup>61</sup> is a superb example of progressive legal history. Another American legal historian, Friedman, has stressed that the law is a product of economic forces.<sup>62</sup> Weber has suggested that the legal system facilitated the rise of industrialization in the nineteenth century by providing security and certainty.<sup>63</sup> Horwitz develops these "reflective" and "facilitative" concepts in his

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<sup>59</sup> *Supra* note 29, at 78.

<sup>60</sup> "Writing Canadian Legal History," in Flaherty ed., 1 *Essays in the History of Canadian Law* (1981) 3 at 4.

<sup>61</sup> *The Transformation of American Law 1780 - 1860* (1977).

<sup>62</sup> *A History of American Law* (1973) at 14-15.

<sup>63</sup> Rhinstein, ed., *Max Weber on Law and Economy and Society* (1954) at 29 - 40.

examination of the American legal system and economic development from 1790 to 1860. His thesis is that a radical break took place in the law as the judiciary engineered the facilitation and legitimation of industrial capitalism. Business interests preferred to arrange economic advantages and subsidies through the courts because adjudication is less politically conspicuous than the legislative or administrative process.<sup>64</sup>

American law, before 1790, reflected customary English emphasis on property and status as was appropriate for a pre-industrial order. Horwitz illustrates that after 1790, American judges abandoned or modified important aspects of property, tort and contract law. The judiciary was "instrumental", transforming law to aid or mystify the redistribution of wealth and power that resulted in a new economic order:

Property interests lost their sacrosanct status as the ideas of economic growth and competition came to have more compelling utility than the older ideas of stability and monopoly. . . . [E]merging 'contractarian' theories purported to base liability on will, consent or meeting of minds rather than status or property rights.<sup>65</sup>

Horwitz asserts that by the 1850s the capitalist class fully established its economic supremacy. It then became necessary to complete the legitimation of the new doctrines. "Formalism" replaced instrumentalism as the main mode of judicial activity. In order to protect the newly won gains, the law had to assume a cloak of neutrality and autonomy.

Horwitz's instrumentalism examines how changes in the substantive law create allocative effects which directly facilitate elite interests. Hay has developed an important perspective on a further, more subtle facilitative aspect of the legal system. In an essay in *Albion's Fatal Tree*, he examines the ideological effects of the functional processes in the operation of the eighteenth century English criminal assizes.<sup>66</sup> Weber has observed that belief in the legitimacy of an order may be exemplary and that this belief may be the basis of obedience and social action. The legal system may thus legitimate the *status quo* by fostering belief in the law's obligatory quality. As long as the legal system appears to be fair, it successfully marginalizes conflict.<sup>67</sup> Developing this approach, Hay argues that the eighteenth century English social order was not maintained by police or military force but "by a spirit of

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<sup>64</sup> For superb summaries of Horwitz's work see Sugarman, *supra* note 29, and Holt, *supra* note 38.

<sup>65</sup> Horwitz, *supra* note 61, at 289.

<sup>66</sup> *Supra* note 45, at 17.

<sup>67</sup> *Supra* note 63.

consent and submission fostered in public ceremonial and ritual aspects of the administration of the criminal law."<sup>68</sup>

Horwitz and Hay display the various qualities of progressive legal historians. They demonstrate the historical contingency of the law, develop approaches that explain the relationship of the legal system with its environment and methodically examine a variety of sources. As mentioned earlier, the best essays from the two recent collections indicate that Canadian legal historians are now confidently combining true history with comprehensive scope and methodological rigour. For instance, Wylie and Craven successfully apply Hay's perspective. In his study of the Upper Canadian civil courts, Wylie states:

The function of the latter [the civil courts] was mainly legitimation. Courts facilitated the acquisition of wealth by protecting the property rights of elites. Far more useful, however, was their ability to minimize social conflict by directing it within the narrow confines prescribed by the law. The success of this process depended on the public acceptance of the law. For this purpose provincial leaders drew upon the powerful mythology of the common law as embodying the basic rights of Englishmen to private property and freedom from arbitrary authority.<sup>69</sup>

Craven's superb essay on the theatre of the mid-nineteenth century Toronto Police Court is a determined application of Hay's theory:

My evolving view of the Police Court and the press reports corresponds to Hay's analysis on a number of points. Like him, I am concerned with the ambiance of the court rather than with the law as a body of substantive doctrine. Similarly, my view, like his, is turning to the uses of the law — more exactly, of the vicarious experience of being brought to the law — in a broadly ideological sense, seeing it as contributing most generally to legitimation and consent, more narrowly, as he puts it, to 'vindicate or disguise class interests.'<sup>70</sup>

Craven adds:

Perhaps the fundamental ideological significance of the Police Court reportage, then, was in its reiteration of a grand, melodramatic, and in the final analysis, quite empty antagonism of respectable and miserable, to substitute for the far more real and threatening conflicts that the evolving industrial society embodied.<sup>71</sup>

## VI. PARTICULAR CANADIAN ISSUES

Enthusiasm for progressive legal historical approaches containing methodological rigour, comprehensive scope and true historicism should not preclude their refinement or criticism. For example, Canadian

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<sup>68</sup> Craven, *supra* note 7, at 249.

<sup>69</sup> *Supra* note 4, at 5.

<sup>70</sup> *Supra* note 7, at 249-50.

<sup>71</sup> *Id.* at 298.

scholars must be sensitive to their own jurisdictional particularities. Full attention must be paid to our unique conditions if our legal history is to be both progressive and Canadian.

The most progressive current work appears to be directing attention to some of the more pressing Canadian legal historical problems. Nonetheless, some direct reflection about these particular issues is appropriate. Their selection and consideration here is intended to be suggestive only. The issues include regional diversity, institutional conservatism and the country's unique mode of economic development. This is a somewhat arbitrary selection but it does roughly correspond to some of preoccupations of many Canadian non-legal historians. These particular issues exist beyond the general concerns of historicism, scope and method and in no manner diminish their importance.

#### A. *Regional Contrasts: A Canadian Legal Identity?*

The comparison of legal development in different Canadian jurisdictions requires further exploration. Such comparative work must start with the reception question. It is central to the understanding of the character of any former colonial legal system. The reception of English law took different forms in our various jurisdictions.

This problem underlines the importance of promoting greater communication between Canadian legal historians. They must compare their work, clarify regional differences and discern common ground which may constitute an identifiable Canadian legal culture. The Law Journal and Osgoode Society essays are held out as representative of Canadian legal history. However, central Canada unsurprisingly dominates the essays. Greater exchange throughout the whole country depends on determination and support. French and English translations and comparative approaches must be promoted.

#### B. *Institutional Conservatism: Its Significance in the Legal System and Judiciary in Particular*

Institutional conservatism is closely linked to the loyalism of the original colonial elites and the various forms this loyalism took in post-Confederation Canada. Conservatism is also a dominant historical theme in Canadian law. Risk has remarked about the nineteenth century Ontario judiciary:

[T]he most important influence was England, and the obligation to follow English authority seemed greatly to restrict the power to create and to make much of the analysis of problems into a concern for the existence and scope of authority. Eventually obligation became habit . . . strongly supported by the loyalty of the colony . . . among the governing classes, and the strong appeal of English

legal traditions to the lawyers. All these combined to make our courts — and our entire legal community — a legal colony, forbidden and eventually unwilling to consider its own legal destiny openly.<sup>72</sup>

In an essay in the first volume of the Osgoode Society essays, Jennifer Nedelsky provides an alternate view of the reasons for and implications of legal conservatism.<sup>73</sup> She distinguishes between conservatism and formalism and between conservatism as a literal description of the court's behaviour and conservatism as a claim about the reasons for judges' behaviour. After drawing these important distinctions, she asserts that judicial conservatism was not a matter of legal colonialism, but a conscious concession of authority to the legislatures.<sup>74</sup>

However, is it not possible that there was something more than either unimaginative derivation or concession of powers in the attitudes and activities of the courts? There is potential to take analysis deeper. Various questions may be posed. Did conservatism in the judiciary and throughout the legal system serve ideological functions? Did it possibly function as a legitimating guise over the promotion of socio-economic interests? Is it not possible that conservative legal conceptualizations and treatment of pressing problems served to marginalize conflict by resolving interests through what was conceded to be impartial processes? Did this possibly allow powerful interests room to manoeuvre without political controversy?

Caution is required when dealing with the question of legitimation and the functional processes of the legal system. Hyde, for instance, points out that empirical evidence for the existence of legitimation is very weak.<sup>75</sup> A great deal of law-abiding behaviour may be understood in terms of rational calculation of costs and benefits. There is little evidence to suggest that law shapes beliefs or that there is even popular awareness of legal questions.<sup>76</sup> According to Hyde, uncritical reliance on the notion of legal legitimation has led to sloppy forms of discourse, a simplistic functionalism and a diversion from necessary attention to the effects of substantive law.<sup>77</sup>

Hyde's concerns are well founded. However, the effects of the functional processes of the legal system in marginalizing conflict and

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<sup>72</sup> Risk, "The Law and the Economy in mid Nineteenth-Century Ontario: A Perspective," in Flaherty, ed., *supra* note 60, at 88, 125.

<sup>73</sup> Nedelsky, "Judicial Conservatism in an Age of Innovation: Comparative Perspectives on Canadian Nuisance Law 1880 - 1930," in Flaherty, ed., *supra* note 60, at 281.

<sup>74</sup> *Id.* at 281-83, 306-12.

<sup>75</sup> Hyde, *supra* note 46, at 385.

<sup>76</sup> *Id.* at 386, 397, 414-15.

<sup>77</sup> *Id.* at 389, 419, 425.

generating consent cannot be denied. The effects of the substantive law cannot be backed merely by the naked coercive power of the state. The stable promotion of elite interests requires a combination of effective substantive law and subtle functional processes. Legitimation as a result of the latter phenomena may be a very helpful way of understanding conservatism in the Canadian legal system.

### C. *The Legal System and Economic Development*

This area is a particularly fertile field for further Canadian research. Risk has broken the ground with studies of different aspects of Upper Canadian law and economy in the mid-nineteenth century.<sup>78</sup> He observes that within the general limits imposed by loyalty to English law and general legal conservatism, there was a small measure of encouragement for frontier individual enterprise in certain areas of the law.<sup>79</sup> However, there is an important aspect of Canadian economic development that remains unexplored: the function of the legal system in relation to the public role in this development.

Horwitz's work is an obvious example to follow in this area. However, application of his instrumentalism thesis to the Canadian situation would run into serious difficulties. This highlights the dangers of over-dependence on theoretical perspectives geared to different situations. Enthusiasm for progressive legal historical approaches combining methodological rigour, social scientific scope and true historicism should never preclude criticism. There exist constitutional, structural and conceptual problems with Horwitz's thesis, as well as basic economic structural differences between the United States and Canada.

The American constitution has given the American courts a much wider scope of review and ability to influence economic policy and decisions. Matters which the Canadian courts would consider political are often treated as constitutional legal matters in the United States. Undoubtedly this has had the effect of creating a larger direct role for the American courts in shaping the law to the needs of industry.

Horwitz stresses that business interests preferred to arrange economic advantages and subsidies through common law adjudication, because adjudication is less politically conspicuous than the legislative or administrative process. Epstein argues that this does not recognize the limitations of judicial decision-making, particularly the structural features that limit what the manipulation of the common law rules can

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<sup>78</sup> Risk, *supra* note 72.

<sup>79</sup> *Id.* at 103 and 107.

- achieve.<sup>80</sup> He points out various technical limitations such as the generality of rules, the indeterminate alignment of economically interested parties and the limited allocative effect of the common law as compared with direct government action or administration.<sup>81</sup>

Conceptually, Horwitz's instrumentalism neglects aspects of legal decision-making outside the courts and underestimates the ideological function of the law. Horwitz's perspective appears to be influenced by the American pragmatist tradition shared by the legal realists, Holmes and Dewey. While rejecting normative and analytical jurisprudence and focusing on the law in action, this tradition has directed disproportionate attention to the judiciary.<sup>82</sup> Research directed to this area tends to create a focus on inter-elite tensions (the only social groupings able to go to the courts). One must examine areas such as legislation and administration in order to get a balanced social picture and a sense of the full role of law in economic development.<sup>83</sup> In addition, this intellectual legacy has led to an overly linear concept of the law as a means to an end. Horwitz's view of the transition from instrumentalism to formalism underplays the importance of legitimation. As Holt states, "Economics and law interact not in a linear simple, one cause one effect way, but in a complex, inter-related organic fashion."<sup>84</sup> As discussed earlier, the ideological function is of particular importance in the Canadian situation. The loyalism and conservatism in Canada contrasts with the United States where a revolutionary break opened the way for more direct innovation according to economic need.

The economic picture in Canada was quite different from the nineteenth century with which Horwitz deals. The Canadian economy was an integral part of the British empire and dependent on it for capital and markets.

How were the legal system and economy connected in Canada? It is suggested that the central features of Canadian law and economy are directly related to Canada's unique collectivist economic history. There

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<sup>80</sup> *The Social Consequences of Common Law Rules* (1982), 95 Harv. L. Rev. 1717 at 1718.

<sup>81</sup> *Id.* at 1721.

<sup>82</sup> See Hunt, *The Sociological Movement in Law* (1978) at 48. Legal realists posed questions like: To what extent is the law a means to social goals? What is involved in creating law and putting it to effective use? The weaknesses in this sort of instrumentalist conception tend to be: 1) overly expansive view of the role of the judiciary; 2) overly narrow conception of lawyers as facilitators; and 3) tendency towards a functionalist view of society in which legal actors and the legal system contribute to the equilibrium of society in an impartial and apolitical manner. (Horwitz obviously does not have this last deficiency.)

See also Summers, *Instrumentalism and American Legal Theory* (1982).

<sup>83</sup> Sugarman, *supra* note 29, at 78.

<sup>84</sup> *Supra* note 38, at 709.

exists a strong tradition in Canadian economic history and political theory which is preoccupied with the unique role of the Canadian state in economic development. The Bendickson essay on private rights and public purposes in Ontario's waterways does deal with the legal aspects of public involvement in the economy.<sup>85</sup> However, this did not suddenly emerge at the end of the nineteenth century as suggested in that essay. Wide ranging collectivist activity existed from the early days of Canada, striking a strong contrast to the United States and Britain throughout the nineteenth century.<sup>86</sup>

The general theories which account for public involvement in Canadian economic development may be roughly divided into two groups. The idealists (political theorists such as George Grant and Gad Horowitz) stress that the remnants of eighteenth century conservatism were central to the value system of the Loyalists who formed much of Canada's original political elite. This concept of conservatism included an organic view of society and a concern for stable development. This resulted in an outlook which was conducive to a public role in economic development and which contrasted the "rugged individualism" stressed by American conservatives.<sup>87</sup>

The materialists (Innis, Aitken, Macpherson and others) stress the economic structural realities of external domination and continuing capital shortages within the Canadian staples-based economy. Public involvement constituted the only possible response to conditions such as huge expanses of unsettled land, formidable barriers to development, absence of domestic markets and dependence on overseas market forces. Public financial structures were created to facilitate British investment. The state planning and financing of the internal transportation system helped to overcome vast distances, increased access to resources and further enhanced attractiveness to foreign investors.<sup>88</sup> These and other public measures were necessary for the survival of a colonial economy.

There appears to be a strong connection between the conservative legal system and the dependent economy on the basis of public involvement in economic development. According to the idealist interpretation,

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<sup>85</sup> *Supra* note 11.

<sup>86</sup> See generally King, *Ideas, Institutions and the Policies of Government: A Comparative Analysis* (1973), 3 Brit. J. Pol. Sci. 291.

<sup>87</sup> Horowitz, *Conservatism, Liberalism and Socialism in Canada* (1966), 32 Can. J. Econ. & Pol. Sci. 143, and generally, Hartz, *The Founding of New Societies* (1964).

<sup>88</sup> Aitken, "Defensive Expansionism: The State and Economic Growth in Canada," in Easterbrook and Watkins, eds., *Approaches to Canadian Economic History* (1967); Nelles, *The Politics of Development* (1974).



the loyalism and the values of the judiciary and others in the legal establishment included the seeds of acceptance and support of public economic development — a sort of corporative attitude towards public intervention. However, examination of shared abstract value systems will not reveal much about the specific role of the judiciary and its connections with external interests. Further, it is unlikely that values could have formed a significant basis for public activity in any direct sense, and, at any rate, this would be extremely difficult to demonstrate empirically. A more revealing approach would be to deal with the concrete matters stressed in the materialist interpretation.

What requires investigation is the manner in which the legal system dealt with the specific economic developmental issues, as well as its connections with economic interests. The restraint and conservatism of elements such as the judiciary made direct instrumentalism unlikely. However, it is possible that the legal system helped to promote Canada's mode of economic development through legitimation. Loyalism possibly created a common ground of interest between the economic and legal establishments. It is also likely that appeal to tradition defused potentially disruptive conflict and allowed influential interests room to manoeuvre. These problems require a great deal of further research.

The value of interdisciplinary awareness on the part of legal historians is clear. It helps to formulate the relevant issues and points the way to constructive inquiry. In the case of law and economic development, legal scholars can benefit from other scholarship concerned with public involvement in economic development which went beyond merely providing a setting in which private interests could flourish. Awareness of these features is bound to lead to research which will help us understand what made our legal system uniquely Canadian.

#### D. *A Preliminary Inquiry into the Upper Canadian Legal System and Economic Development*

A brief foray into the area of law and economy suggests rewarding possibilities. Some research on the Upper Canadian legal system of the 1830s and 1840s indicates that it played an active part in the development of the colonial economy.

It is clear that the obligation to follow English authority was foremost in the minds of the Upper Canadian judges. As Chief Justice Robinson declared in *Hamilton v. Niagara Harbour and Dock*:

Our adherence to the principles of English law is a duty imposed on us by written law, and it is therefore more strongly obligatory than it may be acknowl-

edged in the courts of the United States.<sup>89</sup>

This type of declaration is repeated throughout the Upper Canadian cases. The conservatism expressed in many decisions leaves no doubt about the general attitudes of the judiciary.

Occasionally, when public economic activity was involved, cracks appeared in this cautious façade. Note the sweeping style adopted by Chief Justice Robinson in *Phillips v. Redpath and McKay*, which involved public activity to promote the exploitation of natural resources:

The Rideau Canal is a public work of great importance to the province in several points of view. Like other great and general benefits, however, it cannot be attained without some general sacrifices — and of necessity, private interest and convenience must, for the sake of such objectives, be made to yield to the public welfare.<sup>90</sup>

This sort of declaration is not typical of the higher courts in the United States or England during this period. It appears that this attitude facilitated public activity, occasionally in stark contrast to private entrepreneurial efforts. In *Griffith v. Welland Canal Company*, a company, heavily backed by public funds, was allowed to flood adjoining land with impunity upon a broad reading of its statute.<sup>91</sup> In contrast, where the private entrepreneurial activity of a mill led to the flooding of neighbouring land, Chief Justice Robinson kept strictly to traditional property rights and remedies.<sup>92</sup>

Therefore it appears that while the Upper Canadian judiciary was more restrained than its American counterpart, exceptions were made when important public economic activity was involved. Facilities such as canals were needed to gain access to resources and attract British investment. In these instances the courts appeared to promote economic growth by accepting flexible and innovative legal interpretation. Although there is nothing approaching the American instrumentalism described by Horwitz, judges such as Robinson do seem to have accepted the importance of facilitating the public economic development of the province. They appear to have been influenced by the ideas of loyalty and the need to build a strong colony within the British empire.

Although much case analysis remains to be done, one must also

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<sup>89</sup> (1842), 6 U.C.O.S. 165 at 174.

<sup>90</sup> (1830), Draper Rep. at 68.

<sup>91</sup> (1841), 5 U.C.O.S. 686.

<sup>92</sup> *Cisler v. Ransom* (1841), 5 U.C.O.S. 513. Both *Griffith* and *Cisler* contrast with Horwitz's description of riparian cases in the United States. There "economically beneficial" private mills often flooded but attracted only limited liability - hardly enough to detract them from continuing their activity. Indeed, limited liability served as an indirect subsidy for competitive activity. See Horwitz, *supra* note 61, at 99.

look beyond judicial decisions. The importance of this is illustrated when one looks at the career of Chief Justice Robinson. He was virtually the legal arm of the Family Compact, simultaneously involved in legislative, administrative and political affairs while holding the office of Chief Justice. He continued as Speaker of the Legislative Assembly and had a direct hand in most of the statutes passed in the 1830s and 1840s, many of which he himself had drafted. Robinson was also a commissioner of the Heir and Devisee Committee, which acted as a tribunal on land claims. Perhaps most importantly, he gave advice to Crown officers and made himself indispensable to the Lieutenant Governors who, at that time, received important legal directions from the Colonial Office. British officials regarded Robinson as the great Tory figurehead, one whose knowledge of colonial affairs was invaluable. As Robinson himself confided to Lieutenant Governor Arthur in 1838:

I do not affect to be without the common feeling of anxiety that all things may be done for the best of the country I live in and from a principle of duty any information I possess upon public questions, and my opinion[s] on private matters . . . are at the service of the representative of my sovereign, whenever he may think it proper to desire them.<sup>93</sup>

After the Rebellion in Upper Canada, Robinson departed for England to exert his influence and give advice on the reform of colonial policy. It was a crucial time. The Colonial Office was influenced by pressures that went beyond legislative reform and political compromise. The gradual shift from mercantilist to free trade economic views of the Empire led many leading British politicians to demand a decrease in colonial spending. While in England, Robinson wrote *Canada and the Canada Bill*, in which he advocated increased British investment, immigration and, in particular, public consolidation of economic decision-making and co-ordination of the development of the St. Lawrence transportation system.<sup>94</sup> The work is an interesting reflection of the economic values of a leading colonial legal figure.

Robinson's specific advice was largely disregarded by Westminster. The rising pressure for free trade by British industrialists led, in part, to the repeal of the mercantilist legislation, such as the Corn Laws. Along with this came the Union Bill which united Upper and Lower Canada in the hope of creating stability and cutting back on colonial administrative costs. The Family Compact suffered some loss of influence. However, the commercial economic elite accommodated

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<sup>93</sup> Letter from John Beverley Robinson to Sir George Arthur (Apr. 16, 1838), Ontario Archives, *Robinson Papers*.

<sup>94</sup> *Canada and the Canada Bill* (1841, reprinted, 1967), esp. at 13, 19, 120, 130.

itself to the new free trade system by adjusting to a new form of economic dependency. The unique mode of public economic development continued. Just as before, state involvement was required for the continued economic viability of the province.

Obviously, this perspective on early Upper Canadian law and economy requires a great deal of further study. This brief excursion serves merely to underline the need to be fully attuned to Canadian peculiarities, the advantages to be gained by reference to non-legal scholarship and the potential for further original work in the area. There is a wealth of legal materials waiting to be explored, material which will undoubtedly support a variety of interpretations. Debate and controversy should not be discouraged. It will stimulate interest, writing and ultimately, a better understanding of our legal past.

## VII. CONCLUSION

Legal historians must accept a wider scope for legal history without fearing the loss of self-identity. This will not induce sloppy adventurism if legal historians remain sensitive to the need for rigorous methodologies. At the most fundamental level history must be taken seriously. The essays in both collections reflect the fact that Canadian legal history is entering a dynamic new phase. The most ambitious of the essays display a confident progressive thoroughness which is most encouraging. One hopes that the law schools and organizations, such as the Osgoode Society, will continue their support so that further work and debate will forever banish old complacencies concerning Canadian legal history.